COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. PURDUE PHARMA L.P., PURDUE PHARMA INC., RICHARD SACKLER, THERESA SACKLER, KATHE SACKLER, JONATHAN SACKLER, MORTIMER D.A. SACKLER, BEVERLY SACKLER, DAVID SACKLER, ILENE SACKLER LEFCOURT, PETER BOER, PAULO COSTA, CECIL PICKETT, RALPH SNYDERMAN, JUDITH LEWENT, CRAIG LANDAU, JOHN STEWART, MARK TIMNEY, and RUSSELL J. GASDIA, Defendants.	)	CIVIL ACTION NO. 1884-CV-01808(B)

MEMORANDUM OF LAW IN SUPPORT OF THE INDIVIDUAL DIRECTORS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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REDACTED VERSION

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Defendants Peter Boer, Paulo Costa, Ilene Sackler Lefcourt, Judith Lewent, Cecil Pickett, Beverly Sackler, David Sackler, Jonathan Sackler, Kathe Sackler, Mortimer D.A. Sackler, Richard Sackler, Theresa Sackler, and Ralph Snyderman (the "**Individual Directors**" of Purdue Pharma, Inc. ("**PPI**")), respectfully submit this Memorandum of Law in Support of their Motion pursuant to Massachusetts Rule of Civil Procedure 12(b)(6) to dismiss the First Amended Complaint (the "**FAC**") filed by the Commonwealth of Massachusetts for failure to state a claim. The Individual Directors have separately served a Memorandum of Law in Support of their Motion to dismiss the FAC for lack of personal jurisdiction pursuant to Massachusetts Rule of Civil Procedure 12(b)(2).[1]

PRELIMINARY STATEMENT

Despite hundreds of paragraphs of added allegations, the FAC suffers from the same fundamental flaw as the Commonwealth's prior complaint. The Commonwealth attempts to impose liability on the Individual Directors, thirteen individuals who served on the Board of PPI (the "**Board**"). PPI is the general partner of Purdue, the manufacturer of OxyContin and other FDA-approved prescription opioids. But the FAC fails to specify how any Individual Director, much less all of them, personally engaged in unlawful promotion of prescription opioids or instructed anyone else to do so. The most basic purpose of a complaint is to notify an individual how he or she is alleged to have violated the law. The FAC's inability to satisfy this requirement for any Individual Director – and, for certain Individual Directors, its failure to plead specific factual allegations of any kind – requires dismissal of the FAC.

[1] The defined terms and citation conventions used in the Memorandum of Law in Support of the Individual Directors' Motion pursuant to Rule 12(b)(2) ("**Personal Jurisdiction Memorandum**" or "**PJ Mem.**") are used in this brief. The Individual Directors join the arguments made by Purdue in the memorandum of law filed in support of its motion to dismiss which is incorporated by reference.

Recognizing its inability to establish that a single one of the thirteen Individual Directors personally violated Massachusetts law, the Commonwealth has filled the FAC with hundreds of pages of allegations and citations of documents demonstrating supposed conduct by "the Sacklers." But the cited documents do not describe actions by "the Sacklers." The FAC obfuscates whether such allegations are referring to actions either by PPI's duly constituted board or specific Individual Directors. Massachusetts law requires far more than what the Commonwealth has pled to state a claim against each of the thirteen Individual Directors.

The FAC mischaracterizes and selectively quotes from the hundreds of documents it cites to create the false impression that the Individual Directors micromanaged every aspect of Purdue's marketing strategy. In fact, nothing in the FAC or the cited documents remotely supports that allegation. What the hundreds of documents cited by the FAC actually show is that the Individual Directors did exactly what one would expect of directors of a company: they received management reports on Purdue's nationwide activities, posed questions to management, and participated in routine board votes to ratify management's proposals for changes to staffing levels and budgets. For example:

- The FAC claims that one Individual Director asked Purdue to "fight back to convince doctors and patients to keep using" Purdue's innovative abuse-deterrent formulation of OxyContin after abuse-deterrent opioids were criticized for not being cost effective (¶484).

  In reality, the Individual Director sent a one-sentence email – [redacted] – asking about Purdue's role in an industry-wide response to the report. Ex. 115. The FAC put words into the Individual Director's mouth that she never said and omits that this report recognized abuse deterrent opioids **averted *thousands* of cases of abuse**.[2]

[2] *See* INST. FOR CLINICAL & ECON. REVIEW, ABUSE DETERRENT FORMULATIONS OF OPIOIDS: EFFECTIVENESS AND VALUE 58 (2017) (report cited in ¶484, n.591).

- The Commonwealth claims that documents showed that the Individual Directors responded to the opioid abuse and addiction crisis by trying to sell prescription opioids "harder" in 2018. (¶489).

  > *In reality*, a plan prepared by Purdue's management — not the Individual Directors — proposed to **decrease** the number of sales calls to promote prescription opioids and to increase visits to promote a laxative product that does not contain opioids. Ex. 116 at slide 147. The FAC also fails to mention that Purdue decided in February 2018 to stop promoting all prescription opioids.

- The FAC criticizes an Individual Director for her role in drafting certain presentations regarding a *potential* joint venture proposed by a third-party private equity fund. (¶¶445-51).

  - *In reality*, the director actually **opposed** the proposed joint venture and had no role in drafting the presentations at issue, which were drafted by management. The potential joint venture was discussed only twice and never actually happened.[3]

Massachusetts law recognizes that directors can and should engage in these kinds of activities, and that normal board oversight of sales and marketing activities does not render a director a "mastermind" of—nor legally liable for—corporate conduct.

The FAC's frequent citation of decades-old documents serves only to underscore that the FAC lacks allegations of any timely action by any Individual Director that could plausibly provide a basis for imposing liability. Notwithstanding that the FAC expressly states that its cause of action arises of out alleged conduct that took place after May 2007, many allegations relate to conduct before the onset of the relevant period. Many more of the allegations take place before the onset of the applicable limitations period. None of the allegations comes close to identifying how any Individual Director engaged in wrongdoing in the Period (or otherwise). The FAC's stale allegations are similarly riddled by further inaccuracies. For instance:

[3] *See* Ex. 105 (referred to in ¶¶446 n.535 and 447 n.536 as "2014-09-10 Presentation", but never once referring to Dr. Kathe Sackler); Ex. 108 (referred to in ¶450 n.540 as "2015-02-24 *Project Tango* presentation," but actually crediting a Purdue executive as its author).

- The FAC misrepresents Richard Sackler's reaction — "not too bad" — to a New York Times article eighteen years ago as callous commentary on the 59 deaths from OxyContin reported in the twelfth paragraph of the article. (¶182).

  - ***In reality***, the underlying email, Ex. 12, makes clear that Richard Sackler was commenting on the full text of the lengthy article — which discussed "[i]llicit dealers" using "suffering patients as well as fakers … to 'doctor shop' to obtain" OxyContin. Nothing in the Individual Director's comment referred to, or minimized, the seriousness of the deaths reported in the article.

- The FAC claims that eighteen years ago, Richard Sackler responded to "Time's coverage of people who lost their lives to OxyContin" by sending a message to Purdue "staff" stating that the "deaths were the fault of the drug addicts." (¶185).

  - ***In reality***, Richard Sackler's response made no references to "deaths" whatsoever. Ex. 10.

This Court should reject the Commonwealth's attempt to premise its claims on stale allegations that are rife with mischaracterizations and factual inaccuracies.

The Individual Directors feel great sympathy towards the individuals, families and communities who are struggling with opioid abuse and addition, and the Individual Directors are committed to working to provide meaningful assistance to those impacted by this public health crisis. That compassion and commitment to work towards meaningful solutions does not mean that the Commonwealth's irrelevant, misleading, and inflammatory allegations should trump the proper application of Massachusetts law. No Individual Director violated Massachusetts law — nor, as set forth in the Motion to Dismiss for Lack of Personal Jurisdiction, is any Individual Director subject to personal jurisdiction in the Commonwealth for the claims alleged here. The Commonwealth's claims against the Individual Directors should be dismissed.

STATEMENT OF FACTS[4]

I. The FAC Largely Relies on Stale Allegations Which Precede the Relevant Period and Predate the Limitations Period

The limitations period for the Commonwealth's claim under G.L. c. 93A ("Chapter 93A") begins on June 12, 2014, and the Commonwealth's nuisance claim begins on June 12, 2015. However, the FAC asserts two claims which it states are based on events allegedly occurring after May 15, 2007 (the "Period"), when the Commonwealth entered into a Consent Judgment (¶¶193-95) with Purdue.[5] As described below, many of the Commonwealth's allegations occurred long before June 12, 2014, and many more took place before the start of the Period.

II. No Individual Director Engaged in Misconduct or Ordered Anyone Else to Violate the Law

"The fundamental purpose of the complaint is to give fair notice to the defendant(s) of the claim(s) asserted."[6] The FAC, however, does not go Individual Director by Individual Director and specify how he or she is alleged to have personally violated the law. Indeed, as discussed below, for some Individual Directors (including Beverly Sackler and Ilene Sackler Lefcourt), the FAC does not include even a single specific allegation. For the remaining Individual Directors, there are few, if any, specific allegations relating to affirmative conduct

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[4] The allegations in the FAC are presumed to be true for purposes of this motion only, and only to the extent that they are not contradicted by documents which this Court can properly rely on in connection with this Motion: documents specifically referenced in the FAC and documents judicially noticeable because they are a matter of public record. *See infra* at p. 28.

[5] The Commonwealth filed its initial Complaint on June 12, 2018 (Dkt. No. 1). On September 7, 2018, the Individual Directors served the Commonwealth with a Motion to Dismiss under Rule 12(b)(2) on the basis that the initial Complaint failed to establish that any Individual Director was subject to personal jurisdiction in Massachusetts. On December 13, 2018, the Commonwealth filed the 274-page FAC.

[6] *See, e.g.*, *Harvard Univ. v. Goldstein*, No. CA 961020, 1996 WL 1186968, at *2 (Mass. Super. July 31, 1996).

during the Period. None of the FAC's allegations plead that any Individual Director personally participated in improper prescription opioid marketing activities in the Commonwealth or ordered anyone at Purdue to do so.

In lieu of making specific allegations, the FAC makes collective allegations about either what it terms "the Sacklers" or the Board's "control[ling]" the Company's "deceptive" sales practices, by "direct[ing]" the hiring of sales representatives, "insist[ing]" that such sales representatives visit certain doctors, and "ask[ing]" for reports regarding "doctors suspected of misconduct." (¶196). But the documents cited by the FAC do not describe actions by "the Sacklers." Instead, the cited documents overwhelmingly relate to PPI's duly-constituted board.[7] The FAC contains a handful of references to occasional emails sent or received by just one Individual Director. Such emails do not show any Individual Director participating in any form of prescription opioid marketing activities.[8] It nowhere alleges misconduct by the Sacklers as a group.

As described below, the FAC and the documents it cites do not identify a single instance of the Board or any Individual Director engaging in improper prescription opioid marketing in Massachusetts or ordering anyone at Purdue to engage in such misconduct, as required to state a claim under Massachusetts law.

A. The FAC's Allegations and Cited Documents Reveal that the Board and Its Directors Engaged in Ordinary Board Activities and Did Not Approve or Direct Any Alleged Misconduct

[7] As set forth in the accompanying Supplemental Memorandum in Support of the Outside Directors' Motion to Dismiss, the Board's members also included highly qualified outside directors.

[8] *Compare e.g.*, (¶ 240) *with* Ex. 29; (¶ 316) *with* Ex.52; (¶ 182) *with* Ex. 12.

While the FAC makes allegations about how "the Sacklers" supposedly exercised control over minute details of Purdue's alleged marketing activities in the Commonwealth, the cited documents tell a different story. These documents show that (i) the Board received information from management about Purdue's nationwide operations; (ii) the Board occasionally voted on management's proposals regarding overall staffing levels or annual budgets for activities nationwide; or (iii) certain Individual Directors raised questions with each other or management about topics relevant to the business.

1. The Vast Majority of the FAC's Allegations Relate to Information the Board Received from Purdue's Management

Many of the FAC's allegations are introduced with the refrains of "staff told the Sacklers" or "staff reported to the Board."[9] On their face, these allegations at most relate to information the entire Board passively received from Purdue's management; they do not describe any actions by any Individual Director actions, let alone any alleged misconduct. The FAC attempts to portray the Board as receiving briefings from Purdue's management in face-to-face meetings or in emails devoted to substantive discussion of certain issues. In reality, the FAC largely relies on small excerpts—often grossly mischaracterized—from lengthy documents provided to the Board, including (i) budget presentation decks; (ii) spreadsheets containing compilations of data; or (iii) periodic reports about Purdue's nationwide operations (the **"Reports"**). The Individual Directors' receipt of these Reports from management provides no support for the FAC's allegations that any Individual Director "directed" or "controlled" the minutiae of activities that these multi-page documents describe. For example:

[9] *See e.g.*, ¶¶ 202, 204, 206-07, 211, 213, 216-18, 235-36, 239, 245-46, 248-50, 254-57, 259-63, 266, 270-71, 277, 280, 290-91, 294, 296, 300, 302, 306, 310, 311-12, 317 & n.291, 319-23, 325-26, 335-37, 339, 345-47, 361-62, 364-65, 367-68, 379 & n.412, 383-85, 387-88, 390-91, 393-94, 396-98, 401-06, 408, 415, 418-27, 430-36, 438, 444, 452, 454-55, 459, 461, 464, 466-67, 475-77, 479, 484, 486-87, 512 n.620, 535-36, 575, 580, 626, 656.

- The FAC alleges that "[s]taff reported to the Sacklers that 'sales effort' was a key reason that profits were high" and "told the Sacklers that Purdue employed 301 sales reps to promote opioids." (¶207). In reality, one page of the cited 54-page Report includes a list of eleven factors that led to increased revenue – sales efforts being just one of them. Ex. 17, p. 46. The information about the number of sales representatives purportedly "told" to the "Sacklers" was included in a chart of "Full-Time Turnover Projection." *Id.* at p. 52.

- The FAC alleges that "staff reported to the Board that Purdue suspected that Dr. Michael Taylor, in New Bedford, Massachusetts, was prescribing opioids inappropriately." (¶311). In reality, Dr. Taylor's name appeared on a spreadsheet along with 700 other healthcare providers whose names appeared on Purdue's "no call list," *i.e.*, doctors who would not receive visits from Purdue's sales representatives.[10] *See* Ex. 55.

The FAC also strategically omits that, during the Period, the Board received frequent updates from management which detailed Purdue's robust compliance efforts. As a result of the Corporate Integrity Agreement that Purdue entered in 2007 ("**CIA**"), its sales and marketing practices were under close scrutiny for five years—through 2012—by the Office of the Inspector General for the Department of Health and Human Services ("**OIG**") and an independent review organization ("**IRO**"). The Reports issued during this period provided a detailed update on Purdue's adherence to the CIA. These Reports assured the Board that Purdue was complying with its obligations under the CIA and that it appropriately addressed compliance issues when they arose.[11] Purdue told the Board that it had successfully satisfied its CIA requirements and

[10] The FAC's allegations about information provided to the Board about Dr. Alvin Chua are misleading for the same reason: his name also appeared only on the spreadsheet containing 700 healthcare providers on the "no call list." *See* (¶312); Ex. 55.

[11] *See, e.g.*, July 2007 report, Ex. 17, pp.54-55 ([redacted]); July 2010 report, Ex.54, p. 16 (noting all requirements for the third year of Purdue's five year CIA have been met); January 2011 report, Ex. 61, p. 20 (describing two-day visit by OIG inspector; OIG Monitor's recommendations for good compliance practices in connection with speaker program which was later adopted); August 2011 report, Ex. 70, p. 28 (stating "[redacted]"); November 2012 report,

the CIA was concluded in January 2013. At this time, though its obligations under the CIA had concluded, Purdue highlighted its commitment to compliance by telling the Board that it was [redacted] Ex. 87.[12]

The FAC identifies one alleged CIA violation, but again misstates what allegedly happened and what the Board was told about it. The FAC alleges that that Purdue disregarded a requirement for managers to conduct in-person supervision of sales representatives in the form of "ride-alongs" (*i.e.*, where a manager would observe a sales representative in the field) for five days per year. (¶256). In reality, a May 2009 management presentation to the Board described how Purdue had conducted an [redacted]; discussed how Purdue was continuing to investigate the issue; and laid out "[redacted] including making [redacted] Ex. 40, slides 4-9. Subsequent Reports informed the Board that Purdue addressed the compliance concerns that had been identified by (i) [redacted]; (ii) implementing preventative measures by compliance, sales management, and the IT departments; and (iii) notifying OIG. *See* Ex. 40, slides 4-9; Ex. 42, p.16; Ex. 49, p. 16. The February 2010 Report notified the Board that the previous September, Purdue had "[redacted]

Ex. 81, p.47 (stating that 5th/final annual report was submitted and that Purdue anticipates successful closure of CIA; also stating that final IRO report concluded that "[redacted]); July 2013 report, Ex. 92, p. 49 (stating that "[redacted]).

[12] Ex. 87. *See also* DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GENERAL, CORPORATE INTEGRITY AGREEMENTS [http://web.archive.org/web/20130217140345/https://oig.hhs.gov/compliance/corporate-integrity-agreements/cia-documents.asp#cia_list].

[redacted] Ex. 49, p. 16. The Board thus received information showing that Purdue's compliance program was operating exactly as intended: Purdue self-identified a problem and fixed it.

Similarly, the FAC makes allegations regarding reports to Purdue's compliance hotline that were not reported to the government, insinuating that this somehow reflected misconduct on the part of the Board. *Compare*, (¶202) *with* Ex. 17, p. 54; *compare* (¶211) *with* 18, p. 60; *compare* (¶217) *with* Ex. 20, p. 24; *compare* (¶235) *with* Ex. 28, p.24 ; *compare* (¶245) *with* Ex. 31, p. 28; *compare* (¶248) *with* Ex. 32, p.28; *compare* (¶255) *with* Ex. 37, p. 25; *compare* (¶346) *with* Ex. 65, p. 44. The FAC omits that in the Reports, Purdue informed the Board and that "[redacted][13] The Board cannot possibly be responsible for reports it did not actually receive. Regardless, what Purdue's management described to the board was fully consistent with Purdue's CIA obligations. The CIA did not mandate reporting every "tip" to its compliance hotline, but rather required disclosure to OIG only of what a "reasonable person would consider a probable violation" of healthcare laws or FDA requirements relating to promotion of prescription medicines.[14]

2. The Board Voted on Ordinary Issues Like Staffing Levels and Annual Budgets; It Never "Controlled" Allegedly Deceptive Marketing

[13] *See* (¶202).

[14] CORPORATE INTEGRITY AGREEMENT BETWEEN THE OFFICE OF INSPECTOR GENERAL OF THE DEP'T OF HEALTH & HUMAN SERVS. AND PURDUE PHRMA L.P. 19-20, www.pharmacomplianceforum.org/docs/resources/PurdueCIA.pdf

The documents cited by the FAC refute the allegations about the Board's supposed role in "controlling," "directing," or "ordering" allegedly misleading marketing activities by Purdue. *See, e.g.*, ¶¶196, 222 n.125, 857. Instead, the cited documents show at most that the Board periodically received information about staffing levels and occasionally voted on issues that would arise at any company like staffing levels and annual budgets.

The FAC makes a sweeping – but false – allegation in paragraph 208 that from 2007 onwards, "the Sacklers ordered Purdue to hire hundreds of sales reps to carry out their deceptive sales campaign." However, none of the 34 cited documents show that the Board "order[ed]" Purdue's management to do *anything*, let alone engage in misconduct. Instead, the documents again relate to information received by the Board from management:

- Twenty-three of the cited documents were simply one-page charts entitled "Full Time Turnover Projections," which listed basic information, on a department-by-department basis, such as the beginning employee count, end employee count, and the number of employees who were terminated, retired or resigned. *See e.g.*, Ex 17, p. 52; Ex. 18, p. 58; Ex. 20, p. 22; Ex. 32, p. 26.
- Nine of the cited documents were simply budget projections. *See* ¶208, n.109
- One cited document was an email from the CEO describing plans for an upcoming layoff. *See* ¶208, n.109

Other documents cited by the FAC in support of its allegations about "the Sacklers" or the Board simply show that the Board assented to various management proposals. For example:

- Paragraph 215 alleges that "the Sacklers voted to spend $86,900,000 to employ sales reps in 2008" and "[t]he Sacklers also voted for a resolution regarding salary increases and bonus targets for the reps." The cited documents, however, establish that (i) Purdue's management prepared a detailed budget for Purdue's nationwide operations and (ii) the Board approved a one-page budget proposal provided to them.[15]

[15] *See* Ex. 47 (cited in ¶268) (Purdue's 2010 budget proposal); Ex. 46 (cited in ¶268) (approval of one-page budget with expense categories for legal fees, general & administrative, research and development, sales and promotion, and operating expenses); Ex. 29 (cited in ¶240) (same for 2008 budget); Ex. 36 (cited in ¶253) (approving bonuses for certain employees for 2008 and compensation levels for 2009).

- The documents cited in ¶¶222 and 223 merely show that in February 2008, the Board assented to Purdue's proposal to hire 100 sales representatives, associated managers, and support staff. *See* Ex. 15 (cited in ¶222) (board authorizing the hiring of sales personnel); Ex. 19, slide 15 (cited in ¶223) (management's proposal to hire the sales representatives)[16]; Ex. 52 (cited in ¶314) (authorizing the hiring of personnel in connection with the Butrans launch); Ex. 80 (cited in ¶389) (authorizing the search for a vice president of external affairs).

The FAC does not and cannot allege that a board's approval of a management plan to hire employees or an annual budget somehow makes its directors responsible for anything unlawful a future employee might do at some later date.

Finally, the Board did not do anything to "control" Purdue's salesforce. The FAC's rhetoric notwithstanding, none of the documents cited in the FAC actually supports the allegation that the Board played any role in determining what sales representatives would be saying to healthcare providers during sales visits, let alone instructing them to make misleading statements about prescription opioids. For example:

- Paragraph 254 alleges that "the Sacklers had a ***detailed conversation*** with Sales VP Russell Gasdia about the staffing of the sales force, how many sales reps the company should employ, and how many prescribers each rep would visit each year" and "told sales executives to hire a new staff member who would contact prescribers electronically and would promote Purdue opioids through the deceptive website Partners Against Pain." However, none of the cited documents involves or references actual discussions with any of the Individual Directors. Instead, in one email, a Purdue executive describes future plans to discuss with the Board Purdue's recommendation to hire additional staffing and an associated budget increase. Ex. 38. In another cited email, an executive mentions that the Board had authorized sufficient "headcount" such that management could hire a director of e-promotion. Ex. 39.

- Paragraph 299 alleges that "[***t]he Sacklers required*** each rep to visit an average of 7.5 prescribers per day." However, the cited Report merely describes management's objective to "[redacted]" Ex. 50, p. 4.

- Paragraph 300 alleges that "[t]he Sacklers . . . set targets for the total number of sales visits by the entire force per quarter." In fact, the cited Report reflects that Purdue's

[16] This management proposal references the use of sales representatives to promote not only OxyContin but laxatives as well. Ex. 19, slide 3.

management set the quarterly goal of sales visits for all of Purdue's products (including both prescription opioids and laxatives). Ex. 50, p. 4.

- Paragraph 308 alleges that "[t]he Board pushed staff about whether they were describing the benefits of opioids aggressively enough" because the "Board wanted to know why Purdue didn't claim 7 days of effectiveness in its marketing." The cited document does not show the Board [redacted] Ex. 53, p. 5 (cited in ¶ 308, n.280). This document confirms that Purdue did exactly what it was supposed to be doing, *i.e.*, using marketing materials that conformed to applicable data.

- Paragraph 393 alleges that "[s]taff told the Sacklers that they continued to reinforce the Individualize the Dose campaign, which the Sacklers knew and intended would promote higher doses." The cited Report, however, merely includes a brief reference to the "Individualize the Dose" campaign. It does not indicate that the Board or any Individual Director had a role in developing the campaign or deciding what its objective of the program would be. Ex. 85, p. 13 (cited in ¶393, n.441).

- Paragraph 489 alleges that for 2018, "the Sacklers . . . . decided to sell harder" and they "approved a target for sales reps to visit prescribers 1,050,000 times — almost double the number of sales visits they had ordered during the heyday of OxyContin in 2010." But the cited management presentation was not prepared by the Board or any Individual Director. The cited presentation showed that the number of planned calls to promote OxyContin products actually **decreased** significantly compared to 2010 ([redacted]). Ex. 116, p. 147.[17] [redacted] *Id.*

In sum, the FAC and accompanying documents do not identify a single example of the Board engaging in unlawful conduct or directing others to do so.

B. The FAC's Allegations and Cited Documents Do Not Show How Any Individual Director Personally Engaged in Misconduct

The FAC does not make a single specific allegation regarding Ilene Sackler Lefcourt or Beverly Sackler. For the remaining Individual Directors, the FAC includes few, if any, allegations of affirmative conduct during the Period. As discussed below, the FAC frequently distorts underlying documents to cast aspersions on certain Individual Directors. Not a single

[17] *Compare* ¶489 *with* Ex. 49, p.23.

document shows an Individual Director engaging in any unlawful conduct regarding the sale of prescription opioids or ordering anyone else to do so.

1. David Sackler

The FAC's skeletal allegations regarding David Sackler, who did not join the Board until 2012 (¶172), reflect his limited involvement in a handful of communications that have no bearing on allegedly deceptive marketing. *See* (¶440) (receipt of the update on support from Raymond Sackler); (¶451) (alleged he and others "discussed the discontinuation" of a proposed joint venture "at their Business Development Committee meeting"); (¶¶237, 516) (alleged receipt of a memo about selecting a new CEO for Purdue). None of those allegations support any of the Claims against him.

2. Jonathan Sackler

Stale and Irrelevant Allegations. The Commonwealth asserts a variety of stale and irrelevant allegations concerning Jonathan Sackler. The FAC alleges, for example, that ***in 1994***, he asked that "all Quarterly Reports and any other reports directed to the Board" be sent to various family members on the Board. (¶173); Ex. 1.

The FAC alleges that Jonathan Sackler participated in discussions about "Project Tango," a potential joint venture recommended by a third-party private equity firm to acquire the manufacturer of a form of medication-assisted treatment ("**MAT**") that was already on the market. (¶451); s*ee* Ex. 108. The FAC, however, does not allege what (if anything) he said at those discussions or that Project Tango came to fruition (nor could it, as the FAC recognizes that the joint venture never happened). The FAC also does not allege that Purdue's consideration of Project Tango was somehow unlawful. *See* (¶¶450-51, 482). To the contrary, the Commonwealth has recognized the importance of MAT, requiring hospital emergency rooms to

offer MAT to individuals who need it and to arrange for post-discharge MAT as well. *See* 2017 Massachusetts House Bill No. 4742.

The FAC also alleges that, from time to time, Jonathan Sackler made inquiries to management[18] or received emails[19]—none of which show that he engaged in any allegedly deceptive marketing on behalf of Purdue.

Misleading Allegations. The Commonwealth complains that Jonathan Sackler suggested to Purdue CEO Craig Landau that Purdue consider launching another opioid (¶¶ 492, 825), but intentionally omits the fact that he was proposing an *abuse-deterrent* formulation. *See* Ex. 119. Similarly, the Commonwealth pleads that Jonathan Sackler and others received a "confidential memo about Purdue's strategy, including specifically putting patients on high doses of opioids for long periods of time" from Raymond Sackler (¶440). But the memo Raymond Sackler forwarded said nothing like that. Instead, the memo provided "[redacted]" including a summary of the ***FDA's decision to deny dose and duration limitations on extended release opioids*** in response to a 2012 Citizens Petition from Physicians for Responsible Opioid Prescribing after receiving more than 1900 comments. Ex. 101-02.

3. Kathe Sackler

The FAC's allegations regarding Kathe Sackler principally relate to "Project Tango," which, as described above, was a potential joint venture that was recommended by a third-party private equity firm to acquire a company that manufactured an existing product. The FAC

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[18] *See* ¶¶344, 649 & Ex. 66 (discussing relative decrease in sales of Butrans); ¶358 (notes of meeting reporting that Jonathan had asked about "changes in market share for opioids"); ¶366 & Ex. 71 (seeking confirmation that regular reporting on sales would resume after holidays); ¶429 & Ex. 99 (asking about media coverage of opioids); ¶468 & Ex. 109, slide 13 (asking about the "OxyContin market impact of CDC Guidelines").

[19] *See* ¶¶210, 226, 229, 234, 237, 243, 341, 342, 343, 515, 516, 599.

erroneously emphasizes Kathe Sackler's supposed connection to Project Tango. (¶¶ 445-451). In fact, the initiative never happened and Kathe Sackler had nothing to do with the PowerPoint decks created by management describing the proposal.

The FAC's allegation that Kathe Sackler participated in drafting presentations about this potential venture are simply not true. The cited documents establish only that Kathe Sackler was emailed one PowerPoint presentation from Purdue about the potential transaction and that Project Tango appeared on the agenda for one Board meeting.[20] She did not even receive the presentation cited in Paragraph 445 of the FAC. No documents show Kathe Sackler playing any role in drafting any presentations about Project Tango; nor could they, because the presentations were drafted by Purdue's management.[21] The FAC's allegations about conclusions reached by "Kathe and the staff" and about "Kathe Sackler's work on *Project Tango*" are a fiction.

The FAC also makes the incorrect allegation that "Kathe Sackler instructed staff that *Project Tango* required their 'immediate attention'" because of an article which discussed "reports of children requiring hospitalization after swallowing buprenorphine – the active ingredient in both Purdue's Butrans opioid and the opioid additional treatment that the Sacklers wanted to sell, through Project Tango." (¶448). This allegation is mistaken for multiple reasons.

First, Kathe Sackler did not state that Project Tango required "immediate attention." In fact, her email did not mention Project Tango at all. Rather, after receiving a news clipping regarding an article about children overdosing on buprenorphine, she sent an email stating: "[redacted]" Ex. 107. Kathe Sackler was concerned, as any responsible director of a pharmaceutical company would be, about a

[20] Exs. 104-105.

[21] Kathe Sackler never received the draft presentation, Ex. 106, for a September 12, 2014 meeting cited in footnote 534 of the FAC.

report about a potential safety risk to children. In response, a Purdue executive assured her that the article had nothing to do with Butrans, a transdermal patch sold by Purdue which contained buprenorphine. Instead, the article discussed overdoses on pills containing a combination of buprenorphine and naloxone, something Purdue did not produce.[22]

Second, it is simply not the case that "the Sacklers wanted to sell" the product that was being manufactured by the potential target of Project Tango. The cited documents show that at the very most, Project Tango was mentioned in passing on a few occasions and the proposal was subsequently abandoned.

4. Mortimer D.A. Sackler

Even though the Commonwealth has access to millions of Purdue-related documents, the FAC identifies only a few that relate specifically to affirmative conduct by Mortimer D.A. Sackler. At most, these documents demonstrate that he occasionally engaged in discussions with management and other Board members consistent with the typical function of a director.

Questions about sales forecasts. The FAC suggests that Mortimer D.A. Sackler behaved improperly by purportedly "demanding" that the sales force act more aggressively in unspecified ways. The cited documents make clear that he did nothing of the sort.

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[22] The FAC alleges that — long before the Period, in 1997 — Kathe Sackler was among a group that wrote that some doctors misunderstood the strength of OxyContin. In addition to being stale, this allegation should also be disregarded because the cited documents do not mention her name or establish that she participated in making statements to doctors about this issue. *Compare* (¶176 & n.65) *with* Exs. 5-7. The allegations regarding Kathe Sackler during the Period establish nothing more than that she occasionally asked for additional information. *See* (¶234 & Ex. 26 (email from Kathe Sackler asking a Purdue executive what he meant by [redacted] on OxyContin sales; the executive responded that he was referring to [redacted]); (¶269 & Ex. 45 (Richard and Kathe Sackler requested various information about sales of OxyContin and competitor products; in response they were provided budget reports and market forecasts); (¶358 & Ex. 68 (notes of meeting reporting that Kathe Sackler asked for Purdue to study the characteristics of patients switching from morphine sulfate extended release (MS Contin) to OxyContin to determine if there were undeveloped markets for OxyContin).

The FAC alleges, for example that "Mortimer Sackler was concerned that staff were not selling Purdue's opioids aggressively enough" and he "demanded to know why staff predicted a decline in OxyContin sales." (¶265). In reality, in response to a ten-year plan circulated to the Board in 2009, Mortimer D.A. Sackler simply asked why Purdue "[redacted] in light of other market forces. Ex. 43. Far from demanding that Purdue's sales representatives become more aggressive, Mortimer D.A. Sackler said that if the projections were accurate, he would oppose [redacted][23]

The abuse-deterrent formulation of OxyContin. The FAC makes the head-scratching claim that Mortimer D.A. Sackler somehow acted improperly by raising a concern about the safety of a potential product. The FAC alleges that Mortimer D.A. Sackler "suggested that Purdue conduct similar studies to find out whether reformulated OxyContin was really safer *before* selling it to millions of patients" but that a decision was made by "the Sacklers" not to conduct the research. (¶228). The FAC does not and cannot explain how raising such a concern is improper, let alone tortious.

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[23] Ex. 43 at PPLC012000240033. The FAC's other specific allegations regarding Mortimer D.A. Sackler similarly on their face do not show him personally participating in any of Purdue's alleged misstatements, and the cited documents show nothing more than him asking questions to management. *See* (¶229) & Ex. 24 (email from Mortimer D.A. Sackler asking questions about OxyContin projections); (¶358) & Ex. 68 (minutes from meeting reporting that Mortimer D.A. Sackler asked if Purdue should consider launching an authorized generic version of OxyContin); (¶368) Ex. 73 (email from Mortimer D.A. Sackler inquiring if the timing of the annual national sales meeting should be moved); (¶404) Ex. 89 (email from Mortimer D.A. Sackler asking questions about a consulting firm retained by Purdue, including how the consulting firm was selected, what the consulting firm would cost, and what the consulting firm would be doing for Purdue); (¶414) and Ex. 95 (email from Mortimer D.A. Sackler requesting, in connection with budget planning, a [redacted]; the underlined words were omitted from the FAC).

Regardless, the FAC's allegation that "reformulated OxyContin," by which it refers to the abuse-deterrent formulation of OxyContin, was unsafe because Purdue did not conduct appropriate pre-launch studies is untrue. As the FAC itself recognizes, Purdue did conduct safety research before seeking FDA approval for the abuse-deterrent formulation. (¶228 n.134). FDA approved the abuse-deterrent formulation of OxyContin, meaning that the FDA determined it is safe and effective for its intended uses. *See* 21 U.S.C. § 355(d); Ex. 120. Purdue's clinical testing of the abuse-deterrent OxyContin formulation is described in the FDA-approved label.[24]

More fundamentally, the FAC omits that Purdue's development of an abuse-deterrent formulation of OxyContin was a significant public health breakthrough. The abuse-deterrent formulation of OxyContin made it more difficult for the medicine to be abused by injecting or snorting it.[25] As the documents cited in the FAC make clear, OxyContin had been frequently abused in both of these ways.[26] Shortly after the FDA approved the abuse-deterrent formulation of OxyContin in 2013, attorneys general from the Commonwealth and 41 other states issued a letter to the FDA *praising* its work on abuse-deterrent formulations of opioids. Ex. 82. To this day, the Commonwealth requires insurers to reimburse abuse-deterrent formulations of prescription opioids, and appropriately so. G. L. c. 175, § 47EE. As a document referenced in

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[24] *See* FDA, HIGHLIGHTS OF PRESCRIBING INFORMATION: OXYCONTIN (Apr. 16, 2013), https://www.accessdata.fda.gov/drugsatfda_docs/label/2013/022272Orig1s014lbl.pdf.

[25] FDA, Timeline of Selected FDA Activities & Significant Events Addressing Opioid Misuse & Abuse, https://www.fda.gov/downloads/drugs/drugsafety/informationbydrugclass/ucm332288.pdf (accessed Mar. 31, 2019).

[26] *See, e.g.*, Ex. 13 (cited in ¶184 n.83) (2001 New York Times article "[A]busers quickly discovered how to disarm the time-release formula [in the original OxyContin]; they simply crushed the tablet, then swallowed, inhaled or injected the power to give themselves a high as powerful as heroin's."); Ex. 56, slide 7 (cited in ¶319 n.295) (showing that thousands of individuals entering rehabilitation were snorting or injecting oxycodone).

the FAC makes clear, abuse-deterrent opioids have averted thousands of cases of abuse.[27] The Commonwealth cannot second-guess the FDA's determination that the abuse-deterrent formulation of OxyContin is safe and effective for its intended uses. *See, e.g.*, *Dolin v. GlaxoSmithKline LLC*, 901 F.3d 803 (7th Cir. 2018).

Receipt of information about potential acquisition. The FAC makes the baseless assertion that "[t]he Sacklers kept searching for a way to expand their business by selling both addictive opioids and treatment for opioid addiction" because Mortimer D.A. Sackler and others "had a call with staff" about a proposal to buy a company that sold a product that was used to treat individuals who suffered from opioid use disorder. *See* ¶482. In reality, certain Purdue directors and executives received an email which (i) attached a presentation prepared by Purdue's management about a possible transaction involving Braeburn, a company which developed a form of MAT for opioid use disorder and (ii) referenced a *planned* call for the following day.[28] Purdue never acquired Braeburn. Indeed, the cited documents do not even show the Board giving the proposal meaningful consideration, let alone voting on it.

5. Richard Sackler

Despite the FAC's relentless but baseless attempts to condemn Richard Sackler, no allegation concerning Richard Sackler demonstrates that he in any way participated in any allegedly deceptive marketing.

Stale and distorted pre-2007 emails. The Commonwealth attempts to create a false narrative by plucking misleading snippets from emails and documents from the mid-1990s through 2001—all of which precede the post-2007 Period at issue in the Commonwealth's

[27] INST. FOR CLINICAL & ECON. REVIEW, ABUSE DETERRENT FORMULATIONS OF OPIOIDS: EFFECTIVENESS AND VALUE 53 (2017) (referred to in Ex. 115 and cited in ¶484).

[28] Ex. 114 & Ex. 113.

claims—or that manufacture non-existent statements, unsupported by the cited documents, out of whole cloth. These include:

- An irrelevant 1997 email exchange about OxyContin controlled status in Europe, even though the FAC does not claim that Purdue ever sought uncontrolled status for OxyContin in Europe and ***this case is about Massachusetts*** (¶174; Ex. 4).

- An out-of-context excerpt of remarks Richard Sackler made at the 1996 launch event for OxyContin about a "blizzard of prescriptions," without any acknowledgement that the remarks were an allusion to his delayed arrival at that event ***due to the well-known Blizzard of 1996***. (¶175; Ex. 3, p. 2).

- A misleading description of 1997 communications in which Richard Sackler supposedly "directed Purdue staff not to tell doctors the truth"—that "OxyContin is more potent than morphine"—"because the truth could reduce OxyContin sales." (¶176). In fact, ***the emails contain no such direction***. *See* Exs. 5-7. Nor does, or can, the FAC identify deception by Purdue about the relative strength of OxyContin and morphine. The FDA-approved label dating back to the time of OxyContin's launch clearly disclosed to prescribing doctors that it typically takes half as much oral oxycodone to deliver the same pain relief as oral morphine. *E.g.*, Ex. 2.[29]

- False allegations that Richard Sackler "instructed executives that OxyContin … enhanced personal performance, like Viagra." (¶177; *see also* ¶204). In reality, the cited 1998 email makes clear that Richard Sackler was [redacted] (*See* Ex. 8). Richard Sackler used the literature as a prompt for the email's recipients, whom he asked to generate ideas to [redacted] *Id.*

- False allegations that Richard Sackler has "blame[d] and stigmatize[d] people who become addicted to opioids" (¶183; *see also* ¶241) based on a 2001 email exchange with a friend, which commences with Richard Sackler's concern that [redacted] (*See* Ex. 11). In response to his friend's observation that decreasing opioid access harms pain patients and the [redacted] *Id.* That context—the problem of illegal drug diversion to abusers—informs his next comments: [redacted] *Id. See also* (¶477).

[29] The FDA-approved label for OxyContin advised doctors how to convert a daily dose of one opioid into a daily dose of oral oxycodone. Ex. 2. The table advised doctors that when converting a dose of oral morphine to a dose of oral oxycodone, a ratio of 0.5 should be used - i.e., that 80mg/day of oral morphine converts to 40mg/day of oral oxycodone. *Id.*

While Richard Sackler was an officer, and during his tenure as a member of the Board, Purdue took many steps to help deter opioid abuse, including by developing a groundbreaking abuse deterrent form of OxyContin.

- The false assertion that Richard Sackler responded to "Time's coverage of people who lost their lives to OxyContin" by sending a message to Purdue "staff" stating that the "deaths were the fault of the drug addicts." (¶185). Richard Sackler's message contained ***no such statement — not even a reference to death — in the cited document, either in words or in substance***. *See* Ex. 10).[30]

Irrelevant post-2007 allegations. The FAC goes to great lengths to show that, after 2007, while Richard Sackler was a Board member, he actively asked for information, and sometimes allegedly irked Purdue management with his requests.[31] Those inquiries at most demonstrate his interest in the company's progress,[32] including the launch of then-new product, Butrans.[33] But the Commonwealth's strained attempts to falsely recast Richard Sackler's requests as evidence that he controlled Purdue's marketing are consistently belied by the underlying documents. For example:

- The FAC alleges Richard Sackler wanted to "make sure he understood the sales tactic down to the smallest details" (¶219), but the cited document actually shows that his questions were to clarify confusion caused by a typo in the email from the marketing VP to Board members. *See* Ex. 21 ("[redacted]").

- The FAC inexplicably mischaracterizes Richard Sackler's request for information about the "status of covered lives now with OxyContin" broken down by tablets per month, per dose and per day as "a series of questions about Purdue's efforts to get patients to take

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30 *See also* ¶¶178, 181, 182, 186 (pre-2006 allegations).

31 *See, e.g.*, ¶197 (asking the CEO to "reduce the direct contact of Richard"); ¶231 ("Dr. Richard has to back off"); ¶288 (asking the CEO, "Can you help with [Richard Sackler's requests]?"); ¶369 ("avoid as much email with dr. r as you can"); ¶373 ("Anything you can do to reduce the direct contact of Richard …"); *see also* ¶457.

32 *See* ¶¶214, 229, 230, 232, 233, 243, 258, 261, 264, 266, 269, 270, 288, 293, 375, 377, 380, 456.

33 *See* ¶¶198, 328, 331, 333, 352, 369, 371, 373, 381, 382, 392, 428. The remaining allegations about Richard Sackler likewise irrelevant or distorted. *See* ¶¶228, 417, 439, 443, 457, 468, 472, 490, 493.

higher doses and stay on opioids for longer." The email contains no such questions. (¶240); Ex. 30.[34]

- "The FAC alleges that Richard Sackler "insisted that sales reps push the doctors who prescribed the most drugs" (¶353). However, the cited document actually shows that Richard Sackler ***doubted*** that Purdue could "[redacted]" Ex. 67.

- The FAC claims that, <u>in 2011</u>, Richard Sackler "demanded to be sent into the field with the sales reps" and "indeed went into the field to promote opioids." (¶¶354, 356). But, as the allegations make clear, the cited documents that supposedly reflect that he went into the field to promote opioids show only that he expressed an interest in doing so. *See, e.g.*, ¶354, 355. In fact, as noted in the Personal Jurisdiction Memorandum at pp. 16 n.19, 26, that 2011 field visit did not take place and, during the Period, Richard Sackler never went into the field with sales representatives to promote opioids to doctors on behalf of either Purdue Defendant in Massachusetts.

- The FAC alleges that "Richard Sackler was not satisfied" with Butrans sales, so staff told him they were starting research to "find ways to sell more opioids at higher doses for longer." (¶378). The ostensible supporting document is an unsolicited email to Richard Sackler informing him about market research on "[redacted]" Ex. 74.

6. Theresa Sackler

The FAC includes just one allegation about Theresa Sackler. It relates to a one-sentence email that she wrote about an industry initiative.

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[34] The same allegations misrepresent Richard Sackler's polite request—"[redacted]—as a "demand[ ]." ¶240; Ex. 30. Similar mischaracterizations of other courteous requests by Richard Sackler as "demands," "directions," "instructions" and "orders" recur throughout the FAC. *Compare* ¶220 ("Richard Sackler demanded") *with* Ex. 23 (listing "Questions"); ¶226 ("Richard Sackler directed" measuring performance by Rx strength, purportedly because he "intended that sales reps would push higher doses") *with* Ex. 22 (noting issues with the 2008 demand forecasts could be improved with more information; asking, "[redacted]"); ¶260 (alleging that Richard Sackler "demanded a plan to 'boost'" OxyContin sales) *with* Ex. 41 ("[redacted]"); ¶288 (alleging Richard Sackler "order[ed]"an employee to provide information over the weekend) *with* Ex. 48 ("[redacted]"); ¶304 ("Richard directed them to send to the Board plans") *with* Ex. 51 ("[redacted]"); ¶330 (Richard Sackler "ordered … Gasdia to call him") *with* Ex. 62 ("[redacted]").

The FAC alleges that in "May 2017, staff told the Sacklers that an independent nonprofit had concluded that Purdue's reformulation of OxyContin was not a cost-effective way to prevent opioid abuse" and "Theresa Sackler asked staff what they were doing to fight back to convince doctors and patients to keep using the drug." (¶484). This claim is a fiction of the Commonwealth's creation: Theresa Sackler did not urge anyone to do anything, let alone "fight back" to encourage doctors to prescribe a medicine to patients who should not receive it.

This cited document relates to a report about abuse-deterrent opioids. The FAC strategically omits that this Report recognized that abuse deterrent opioids had averted **thousands** of cases of abuse. Ex. 115; *see also* Purdue's Mem. of Law in Support of its Mot. to Dismiss Am. Compl. (hereinafter "**Purdue Mem.**"), at 14. The report, which was supported by the insurance industry, nevertheless objected to the use of abuse-deterrent opioids on the basis that they supposedly were not cost effective. Ex. 115. In response, Theresa Sackler wrote:

[redacted]

7. Peter Boer

The Commonwealth's sole substantive allegation against Peter Boer is that he prepared a "secret memo" in 2007 "for Board eyes only, and not to be shared with Purdue management" about "installing John Stewart as CEO because he would be loyal to the family; pumping up the cash flow from opioid sales; and creating the perception of a sound long-term plan and effective management." (¶¶498, 515). On its face, the memorandum has nothing to do with Purdue's marketing of prescription opioids; it deals with selecting a new CEO for Purdue. *See* Ex. 27. The decision-making surrounding the hiring of a CEO, like most employment decisions, is

properly confidential. Management should not be privy to discussions about the strengths and weaknesses of their potential boss and those discussions should be private.

The remaining allegations regarding Peter Boer—which plead that he participated in a Board retreat (¶515), that he sought updates about Purdue's efforts to fight illegal diversion (¶589) and that he received Reports and similar updates[35]—highlights the vacuity of the allegations against him.

8. Paulo Costa

The FAC allegation that "Costa began discussing Purdue's sales and marketing strategy with staff" (¶551) does not substantiate his personal involvement in Purdue's alleged prescription opioid marketing activities. The cited documents show that Purdue's management sent Costa information about sales and marketing, that he asked a few clarifying questions, but did not otherwise comment. *See* Exs. 77 & 78. Similarly, although the FAC alleges that Costa "strategized with Purdue staff . . . to market Purdue opioids directly to insurance companies and managed care formularies," and that "Costa recommended Purdue's CEO promote opioids directly to the insurance company CEOs" (¶566), the supposed support—a memo listing action items from a meeting Costa attended—actually reflects that t[redacted] *See* Ex. 88. Other documents make clear that Costa was involved in reviewing related internal financial models, not directing any allegedly deceptive marketing to "managed care patients" as alleged,[36] or that he had a question at a committee meeting about the budget. *See* (¶589); Ex. 109, slide 12. The FAC pleads no facts that support any claim against Costa.

[35] *See* ¶¶ 517–520, 523–525, 528–549, 552, 556–565, 567–570, 572–586, 588, 590, 591.

[36] *See* ¶566; Ex. 90; Ex. 91. *See also* ¶571; Ex. 93; Ex. 94.

9. Judith Lewent

The FAC does not include any specific allegations regarding Judith Lewent. Instead, it alleges that she, along with other Individual Directors, attended Board meetings (¶¶ 531, 552), participated in Board votes, (¶¶ 540, 554), and received information from management about Purdue's nationwide activities.[37] The FAC also alleges that she, along with others, made one request for information and posed one question. (¶¶ 534, 557). In both instances, however, the cited documents do not specify which Individual Director (if any) actually posed the request.[38]

10. Cecil Pickett

The FAC does not contain any specific allegations regarding Cecil Pickett. At most, it establishes that he received information and updates regarding Purdue's nationwide activities[39] and attended Board meetings.[40]

11. Ralph Snyderman

The only arguably specific allegation of anything done by Ralph Snyderman is that he asked for "information about the impact of Purdue's sales force on prescriptions." (¶589). In fact, Snyderman had a question, at a Board committee meeting, about how this impact was being calculated for budget purposes. *See* Ex.109, slide 14 ([redacted].

[37] *See* ¶¶ 522, 524, 525, 528, 529, 530, 531, 536, 544, 549, 556–565, 567–570, 572–586.

[38] *See* Ex. 53; Ex. 121 & Ex. 83.

[39] *See* ¶¶ 528–530, 536-539, 543-549, 556–565.

[40] *See* ¶¶ 531, 552, 590, 591.

ARGUMENT

I. The FAC Fails to State a Claim Against Any Individual Director.

The FAC's defects are not limited to its inability to plead jurisdiction over the Individual Directors, as demonstrated in the Personal Jurisdiction Memorandum. The FAC's substantive claims are also fatally flawed as a matter of law. The FAC fails to state a claim against any Individual Director.

To survive a motion to dismiss, the FAC must set forth "'factual allegations **plausibly** suggesting (not merely consistent with)' an entitlement to relief, in order to reflect[ ] the threshold requirement . . . that the 'plain statement' possess enough heft to sho[w] that the pleader is entitled to relief." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008); *see also Ortiz v. Examworks, Inc.*, 470 Mass. 784, 792-93 (2015) (referencing the Court's adoption of this standard). "[D]ocuments sufficiently referred to in the complaint or relied upon in framing the complaint[] may . . . be considered" on a motion to dismiss. *E.g. Olsen v. Seifert*, No. 976456, 1998 WL 1181710, at *3 (Mass. Super. Aug. 28, 1998); *see also Lowenstern v. Residential Credit Sols.*, CA No. 11-11760-MLW, 2013 WL 697108, at *3 (D. Mass. Feb. 25, 2013) ("When such documents contradict an allegation in the complaint, the document trumps the allegation."); *Minute Man Nat. Park Ass'n, Inc. v. Freedman*, No. 12 MISC 458748 RBF, 2012 WL 3535846, at *1 (Mass. Land Ct. Aug. 3, 2012) ("A party's characterization of a document cannot contradict the document itself; the document controls."). This Court may take judicial notice of matters of public record when considering a motion to dismiss. *Reliance Ins. Co. v. City of Boston*, 71 Mass. App. Ct. 550, 555 (2008).

Courts in the Commonwealth routinely grant motions to dismiss a complaint for failure to state a claim where, as here, the plaintiff has not identified a plausible basis for relief. *See .e.g., Galiastro v. Mortg. Elec. Registration Sys., Inc.*, 467 Mass. 160, 173 (2014) (dismissing Chapter

93A claim for failure to state a claim where documents attached to complaint undermined plaintiffs' allegations); *Rhone v. Energy N., Inc.*, 790 F. Supp. 353, 362 (D. Mass. 1991) (dismissing Chapter 93A claim against corporate officers for failure to state claim); *Rick v. Profit Mgmt. Assocs., Inc.*, 241 F. Supp. 3d 215, 225 (D. Mass. 2017) (dismissing Chapter 93A claim against corporate officers for failure to state a claim); *Pilgrim v. Our Lady of Victories Church*, 83 Mass. App. Ct. 1126, at *2 (2013) (dismissing public nuisance claim for failure to state a claim); *Bykofsky v. Town of Lenox*, No. SUCV201201876, 2013 WL 4106659, at *3 (Mass. Super. July 3, 2013) (same).

Among its many substantive defects, the FAC: (i) fails to establish that any Individual Director personally participated in making any of Purdue's alleged misstatements or other allegedly improper marketing activities; (ii) does not allege a cognizable link between any of the Individual Directors' conduct and the alleged harm; (iii) twists the scope of the public nuisance doctrine beyond recognition; and (iv) relies heavily on allegations that occurred before the start of the Period or that are barred by the statutes of limitations. For these reasons and as set forth below, the claims against the Individual Directors should be dismissed.

A. No Individual Director Personally Participated in Purdue's Alleged Prescription Marketing Activities

To state a claim against any of the Individual Directors, the Commonwealth must allege that the Director either ***personally*** participated in, or directed others to engage in, the alleged misconduct. Despite adding over 600 paragraphs to its new pleading, the Commonwealth has still not specifically alleged facts showing that any Individual Director personally made, or directed the dissemination of, misleading statements regarding OxyContin or any other Purdue prescription opioid. Indeed, for nearly all the Individual Directors, the FAC makes few, if any

allegations of affirmative conduct of any kind. Those allegations typically involve nothing more than posing questions to management or making observations in internal emails.

Instead, the Commonwealth pleads collective allegations regarding the Board's activities as a whole, making conclusory allegations that the Individual Directors (as a group) "directed," "approved," or oversaw alleged misconduct. (¶¶8, 196, 222, n.125, 233, 314, 334, 489, 557, 612.) These allegations are insufficient as a matter of law: the Commonwealth must specifically allege how ***each*** Individual Director either personally participated in or directed the alleged misconduct. *See Rhone*, 790 F. Supp. at 362; *New World Techs., Inc. v. Microsmart, Inc.*, No. CA943008, 1995 WL 808647, at *2 (Mass. Super. Apr. 12, 1995) (requiring "direct personal involvement" of corporate officer "in some action which caused the tortious injury"). To adopt the Commonwealth's theory of director liability and hold all of the Individual Directors liable for alleged corporate wrongdoing – without any evidence of direct involvement – would eviscerate bedrock principles of corporate law. No one would become a corporate director if votes on basic issues like budgets and staffing could render them liable for future actions by employees hired or dollars spent as authorized for legitimate purposes by director votes. Indeed, a system where directors could be held personally liable for corporate actions merely because they served on a board and received regular corporate reports would be entirely unmanageable and collapse under the weight of the resulting litigation.

For this reason, Massachusetts courts routinely dismiss actions against corporate directors and officers that do not establish that they had direct personal involvement in the alleged misconduct. *See, e.g., Saveall v. Adams*, 36 Mass. App. Ct. 349, 353-54 (Mass. App. Ct. 1994) (dismissing Chapter 93A claim against individual officer defendants because allegations that they "controlled the company, were the sole stockholders, and were, respectively, president and

treasurer of the company" without more were insufficient to establish liability); *Rick*, 241 F. Supp. 3d at 225 (dismissing Chapter 93A claims in light of "plaintiff's failure to identify the allegedly wrongful conduct of the individual defendants"); *Rhone*, 790 F. Supp. at 362 (granting motion to dismiss against corporate officers who were alleged to have made misstatements under Chapter 93A because the complaint failed to "allege the officer[s'] direct personal involvement in some specified decision or action causally related to plaintiff's injury, not merely involvement in some category of actions.").

None of the FAC's allegations regarding the Board could possibly establish that any or all of the Individual Directors engaged in wrongdoing.

As described above, most of the FAC's allegations regarding the Board do not describe any affirmative conduct, but rather relate to information the Board received from Purdue's management. *See supra*, at § II.A.1. A board's receipt of information does not and cannot mean that its directors collectively engaged in tortious conduct. *See Lyon v. Morphew*, 424 Mass. 828, 833 (1997) (holding "general supervisory role" of corporate officer is not sufficient to support a finding of personal participation). In fulfilling their responsibilities as directors of PPI, a New York corporation, the Directors were allowed and expected to rely on the Reports so they could be properly apprised of management's activities. *See* N.Y. Bus. Corp. L. § 717(a)(1).

To the extent the cited documents show that the Board did anything, they show the Board engaging in ordinary activities such as assenting to management's proposals on various issues, including for changes in staffing levels, annual budget proposals (summarized in one page budgets), changes in compensation levels, and approved distributions to shareholders. *E.g.*, *supra*, at § II.A.2; (¶¶ 240, 253, 460). However, voting on staffing or budget proposals does not and cannot constitute personal participation in, or approval of a company's alleged improper

practices. By voting to authorize the hiring of a sales representative, each director does not become personally liable for anything that the yet-to-be-hired sales representative might do in the future.[41]

B. The Causal Link Between the Individual Directors' Alleged Conduct and the Commonwealth's Harm is Too Attenuated to Impose Liability

The Commonwealth seeks to attribute all of its alleged harms stemming from the opioid crisis in Massachusetts to the Individual Directors. The Commonwealth's own allegations make clear that could not possibly be the case. The FAC does not identify a single instance of an Individual Director participating in allegedly improper opioid marketing or "instructing" others to do so. The FAC's few allegations about affirmative conduct by the Individual Directors do not even attempt to show any relationship between that alleged conduct and harm in the Commonwealth. It follows that no Individual Director did anything that could have resulted in the inappropriate dissemination of prescription opioids in the Commonwealth. The Commonwealth has not and cannot specify a causal connection between the alleged conduct of

[41] The FAC also cannot hold the Individual Directors collectively liable for their role as directors at the time that Purdue allegedly engaged in tortious conduct. Courts have repeatedly held that under Massachusetts law, directors cannot be held liable for the alleged company on whose board they serve. A plaintiff must instead establish personal participation in wrongdoing. *See Lyon v. Morphew*, 424 Mass. 828, 831 (1997) ("Officers and employees of a corporation do not incur personal liability for torts committed by their employer merely by virtue of the position they hold in the corporation.") (citing *Refrigeration Disc. Corp. v. Catino*, 330 Mass. 230, 235 (1953)); s*ee also* 3A William Mead Fletcher et al., Cyclopedia of the Law of Corporations § 1137 (2018) (A "director . . . of a corporation is not personally liable for torts of the corporation . . . merely by virtue of holding corporate office, but can only incur personal liability by participating in the wrongful activity."). Absent allegations that any Individual Director personally participated in any allegedly wrongful conduct by Purdue, allegations that the Individual Directors engaged in typical activities of a corporate director are insufficient to establish liability.

the Individual Directors (if any) and the harm of "addiction, illness, and death" suffered in the Commonwealth (¶904), as required to plead its claims.[42]

The FAC's few allegations about affirmative conduct by the Individual Directors do not even attempt to show any relationship between that alleged conduct and harm in the Commonwealth. For example, nothing in the FAC's allegations about an Individual Director asking questions about a sales forecast developed in connection with a budget proposal (¶265) or participating in a discussion about a potential business venture that never happened (¶451) could possibly have caused the opioid-related harm that the Commonwealth asserts in the FAC. And even if the insurmountable gap connecting any Individual Director and Purdue's prescription opioid marketing were somehow bridged, the Commonwealth could still not properly plead causation. *See Kent v. Commonwealth*, 437 Mass. 312, 321 (2002) ("If a series of events occur between the negligent conduct and the ultimate harm, the court must determine whether those intervening events have broken the chain of factual causation or, if not, have otherwise extinguished the element of proximate cause and become a superseding cause of the harm.") (dismissing claims for lack of proximate cause); *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 360–61 (2001) (courts should consider "the simple length of the causation chain that the

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[42] To state a viable claim against the Individual Former Directors for public nuisance, the FAC must allege that she or he was *personally* both the factual and legal cause of the Commonwealth's harm. *See Town of Hull v. Mass. Port Auth.*, 441 Mass. 508, 517 (2004) ("A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing common injury."); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 706 (9th Cir. 2001) (proximate cause is an element of public nuisance); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 202 (1st Dep't 2003) (same).

The Commonwealth cannot seek damages under Chapter 93A (*see* Purdue Mem.), but regardless the Commonwealth would need to demonstrate "'that the defendant's unfair or deceptive act caused an adverse consequence or loss,'" *Commonwealth v. Bragel*, No. CIV.A. 2012-865-C, 2013 WL 7855997, at *2 (Mass. Super. Dec. 3, 2013) (quoting *Rhodes v. AIG Domestic Claims, Inc.*, 461 Mass. 486, 496 (2012)) (dismissing c. 93A, § 4 claim where the Commonwealth alleged "entirely speculative" harm).

plaintiffs' claims entail, and the difficulties of potential proof that such a length necessarily involves") (affirming dismissal of certain claims because harm was too remote).

There can be no plausible causal link between any report received or email sent by any Individual Director and the harm allegedly suffered in the Commonwealth because there are many contributors to opioid abuse that indisputably result from third parties, including illegal street drugs including fentanyl and heroin that are trafficked by drug dealers, (¶ 88), irresponsible dispensation by pharmacies, (¶ 412), and the role of doctors who overprescribed for personal financial gain, (¶¶ 120, 123, 127, 735). Indeed, recent public statements from the Commonwealth confirm that the overwhelming percentage of individuals who suffer opioid overdoses have fentanyl, a highly lethal synthetic opioid sold by drug dealers, in their system at the time of death.[43] Furthermore, the Commonwealth's own allegations are that the vast majority (over 93 percent) of the victims who tragically overdosed never had a prescription for OxyContin at any time. *Compare* (¶15) *with* (¶22). While any overdose is devastating, if overdoses were 93 percent lower than they currently are, the crisis would look very different.

C. The Commonwealth Fails to Plead the Elements of a Nuisance Claim.

The Commonwealth's allegations fail to state a claim for nuisance under Massachusetts law (¶904) for three independent reasons.

First, as with other tort claims, to state a cause of action for nuisance against a director, Massachusetts law requires allegations that the director personally participated in conduct creating the alleged nuisance. *Claiborne v. Town of Cohasset*, No. 02-P-1465, 2004 WL 57436,

[43] *See, e.g.*, Mass. Dep't of Pub. Health, Data Brief: Opioid-Related Overdose Deaths among Massachusetts Residents 2 (2019), https://www.mass.gov/files/documents/2019/02/12/Opioid-related-Overdose-Deaths-among-MA-Residents-February-2019.pdf ("Among the 1,445 opioid-related overdose deaths in 2018 where a toxicology screen was also available, 1,292 of them (89%) had a positive screen result for fentanyl.").

at *2 (Mass. App. Ct. Jan. 13, 2004) (dismissing private nuisance claim where there was no evidence that the relevant corporate acts were "performed personally" by the corporate officer); *see also Lyon v. Morphew*, 424 Mass. 828, 831 (1997) (citing *Refrigeration Disc. Corp. v. Catino*, 330 Mass. 230, 235 (1953)) (officers do not incur personal liability for torts committed by corporation by mere virtue of the position they hold). The Commonwealth's nuisance claim fails because the FAC does not plead that any of the Individual Directors personally participated in making alleged misstatements or other marketing activities that the Commonwealth asserts gave rise to the supposed nuisance. *See supra* §I.A; *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 907 (1st Cir. 1980) (personal liability for corporate officers requires "direct personal participation");*Culley v. Cato*, No. 064079, 2007 WL 867043, at *5 (Mass. Super. Mar. 5, 2007) (dismissing 93A and common law tort claims where plaintiff "fail[ed] to plead sufficient facts to implicate these corporate officers' personal involvement in the alleged tortious conduct"). As discussed above, the FAC also fails to allege any cognizable link between any of the Individual Directors' alleged conduct and the Commonwealth's alleged harm, as required to state a claim. *See Alholm v. Town of Wareham*, 371 Mass. 621, 626 (1976) (plaintiff bears the burden of proving alleged public nuisance is the proximate cause of injury). These defects are fatal to the Commonwealth's nuisance claim.

Second, the Commonwealth's public nuisance claim also fails because Massachusetts law requires a nuisance claim to be based on the wrongful use of property. *See, e.g.*, *Jupin v. Kask*, 447 Mass. 141, 158 (2006) (noting "traditional public nuisance cases" include "those involving highways and navigable streams or the keeping of diseased animals or the maintenance of a pond breeding malarial mosquitos"); *Leary v. City of Bos.*, 20 Mass. App. Ct. 605, 610 (1985)

(same).[44] The Commonwealth ignores this requirement entirely, basing its nuisance theory on the sale of FDA-approved prescription medications. (Purdue Mem. at 19–22). This is not a basis to plead a nuisance claim under Massachusetts law.

Finally, Massachusetts courts have expressly rejected a theory of nuisance analogous to the Commonwealth's theory: that a lawful consumer product that is not inherently dangerous can become dangerous if abused. In *Jupin*, the Supreme Judicial Court explained that the improper storage of lawful firearms cannot be a public nuisance because the firearms themselves do not "inherently interfere with or threaten the public safety"—any injury came from the "theft and use of the gun by a third party." 447 Mass. at 159. *Jupin* thus forecloses the Commonwealth's public nuisance claim here, as the FAC's theory is premised on the distribution by third-parties to people with addiction to opioids that the FDA has concluded are appropriate for their intended use. Courts across the country have consistently rejected similar attempts to expand the nuisance doctrine in this fashion, dismissing nuisance claims based on the sale of a lawful consumer

[44] The one exception to this well-established rule is recognized is a trial court decision in *City of Boston v. Smith & Wesson Corp.*, a case involving the *illegal* sale of firearms. No. 199902590, 2000 WL 1473568, at *14 (Mass. Super. July 13, 2000). That is fundamentally different from the legal sale of FDA-approved prescription opioids. The court's statement that "a public nuisance is not necessarily one related to property," *id.*, results from a misinterpretation of *Leary*, 20 Mass. App. 605, in which the Appeals Court observed that "in its broadest statement," public nuisance "seems unconnected to place or property," but then went on to state that the traditional doctrine actually concerns "[t]wo well-developed categories," both of which are property related: (1) cases involving highways and navigable streams, and (2) cases involving danger extending beyond the limits of a particular property, such as "the keeping of diseased animals or the maintenance of a pond breeding malarial mosquitos." 20 Mass. App. Ct. at 609-10. The Appeals Court then dismissed a public nuisance claim "where the alleged public nuisance was neither dangerous to persons or property beyond the limits of the property nor infringed upon a long standing public right, such as travel on a public highway or on a navigable stream." *Id.* at 610. Unsurprisingly, in the twenty years since *City of Boston* was decided, the weight of authority – both nationwide and in Massachusetts – dictates that the Commonwealth's public nuisance theory is not viable. *See, e.g., Town of Westport v. Monsanto Co.*, No. CIV.A. 14-12041-DJC, 2015 WL 1321466, at *3 (D. Mass. Mar. 24, 2015) (declining to follow *City of Boston* as the decision is "unexamined by Massachusetts higher courts" and dismissing public nuisance claim against manufacturer and distributor of polychlorinated biphenyls).

product. *See Tioga Pub. Sch. Dist. No. 15 of Williams County, State of N.D. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (asbestos); *State v. Lead Indus. Ass'n, Inc*., 951 A.2d 428 (R.I. 2008) (lead pigment); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007) (lead paint); *Detroit Bd. of Educ. v. Celotex Corp*., 493 N.W.2d 513 (Mich. App. 1992) (asbestos).[45] And for precisely this reason, a Delaware court recently rejected a nuisance claim by the Delaware Attorney General against many of the same corporate defendants named here. *State ex rel. Jennings v. Purdue Pharma, L.P.*, No. CVN18C01223MMJCCLD, 2019 WL 446382, at *12 (Del. Super. Ct. Feb. 4, 2019) ("There is a clear national trend to limit public nuisance to land use.").

Indeed, by alleging that Purdue's sale of prescription opioids created a nuisance, the Commonwealth is attempting to supplant both the FDA, which regulates the sale of prescription medicines, and traditional tort law, which allows a party who is directly injured by a consumer product to bring suit against the product's manufacturer. *See, e.g.*, *Mattoon v. City of Pittsfield.*, No. 93-0417, 1996 WL 34393584 (Mass. Super. Jan. 17, 1996) (public nuisance claim dismissed because claim based on quality of product "sounds more appropriately in tort"). Under the nuisance theory advanced by the Commonwealth, a government could bring an action against the manufacturer of *any* lawful consumer product with some connection to a widespread social harm which required the government to incur some expense, such as smoking, alcohol, or even fast food. Courts have repeatedly cautioned against this kind of expansion of tort law. *See Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (extending the nuisance doctrine to encompass the sale of consumer goods would create "a monster that would

[45] *See also* Restatement (Third) of Torts: Liab. for Econ. Harm § 8 TD No 2 (2014), *comment g* ("public nuisance is an inapt vehicle" for addressing "problems caused by dangerous products" and "contemporary case law has made clear that [the doctrine's] reach remains more modest" than the "broad language that appears to encompass anything injurious to public health and safety").

devour in one gulp the entire law of tort, a development we cannot imagine the North Dakota legislature intended when it enacted the nuisance statute.").

D. All Claims Against the Individual Directors Are Fully, or in the Alternative, Partially Time Barred

Not only are the causes of action against the Individual Directors substantively defective for the reasons described above, but they are also barred in whole or in part by the applicable statutes of limitations. As described below, the FAC should be dismissed because it relies almost entirely on conduct outside of the applicable limitations period, which bars claims before June 2014 (for §93A claims) and June 2015 (for nuisance claims). Seeking to excuse the pleading of stale allegations, the Commonwealth attempts to apply the discovery rule to toll the applicable limitations period. However, this doctrine is reserved for allegedly wrongful conduct that is hidden from possible discovery by a potential litigant and has no application here: the Commonwealth had extraordinary access to information regarding Purdue's marketing practices from the 2007 consent decree until at least the completion of the CIA in January 2013. In these circumstances, the discovery rule should not apply, and any allegations outside of the applicable limitations period should be disregarded.

1. The Commonwealth's Claims Are Based on Conduct Outside the Relevant Limitations Period.

The Commonwealth's claim pursuant to Chapter 93A is governed by a four-year statute of limitations, while its public nuisance claim is governed by a three-year statute of limitations. *See* G. L. c. 260 § 2A; G. L. c. 260 § 5A. Therefore, the Commonwealth's claims against the Individual Directors are time-barred to the extent allegations are based on alleged conduct that occurred before June 12, 2014 for Chapter 93A and June 12, 2015 for public nuisance.

Notwithstanding the applicable limitations period, the FAC purports to cover Purdue's alleged conduct since May 2007, when Purdue entered into the Consent Judgment in this Court.

(¶189). Moreover, as the FAC mentions, from 2007 through 2012, Purdue's sales and marketing practices were under close scrutiny by the OIG. As described above, Purdue satisfied its obligations under the CIA and the agreement terminated in January 2013.[46]

On their face, the vast majority of the FAC's allegations are time-barred. Indeed, the FAC alleges a very small number of allegations regarding affirmative conduct by the Individual Directors during the limitations period. None of those few timely allegations involve any Individual Director participating in prescription opioid promotion of any kind.[47] Instead, the allegations relate to *proposals* by Purdue's management to acquire companies that were not adopted; management's budget proposals; Board votes regarding salesforce levels and annual budgets; and a few requests by certain Individual Directors to Purdue's management for information. *See, e.g.*, ¶¶445-451, 458, 464, 484, 492, 494, 589.

2. The Discovery Rule Cannot Salvage the FAC's Untimely Allegations.

Recognizing that the claims against the Individual Directors are time-barred, the Commonwealth seeks to argue that the statute of limitations should be tolled pursuant to the "discovery rule" because the defendants – as a group – supposedly engaged in "fraudulent concealment." (¶ 838).

However, for the discovery rule to apply, the Commonwealth bears the burden of pleading facts to demonstrate that that its causes of action were inherently unknowable. *See Kahyaoglu v. Caritas Carney Hosp.*, No. 12-P-1470, 2013 WL 4253968, at *3 (Mass. App. Ct. Aug. 16, 2013) ("[O]nce the defendant establishes that the time period between the plaintiff's

[46] DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GENERAL, CORPORATE INTEGRITY AGREEMENTS [http://web.archive.org/web/20130217140345/https://oig.hhs.gov/compliance/corporate-integrity-agreements/cia-documents.asp#cia_list].

[47] *See* ¶¶ 443, 445-51, 456, 458, 460, 464, 468, 472, 473, 482, 484, 485, 489, 490, 492, 493, 494, 495, 588, 589.

injury and the plaintiff's complaint exceeds the limitations period set forth in the applicable statute, the plaintiff bears the burden of alleging facts which would take his or her claim outside the statute.") (internal citations omitted). Under the discovery rule, a claim accrues "when the plaintiff discovers or reasonably should have discovered that she has been harmed by the defendant's conduct." *Proal v. JP Morgan Chase & Co.*, 202 F. Supp. 3d 209, 215 (D. Mass. 2016) (applying Massachusetts law), *aff'd sub nom. Proal v. J.P. Morgan Chase Bank*, N.A., 701 F. App'x 12 (1st Cir. 2017). Lack of knowledge of the "extent and nature" of the cause of action is not a basis for the application of the discovery rule where the plaintiff was aware of facts sufficient to put him on notice of the cause of action. *Solomon v. Birger*, 19 Mass. App. Ct. 634, 638 (1985).

The Commonwealth has not and cannot meet its burden of pleading facts that would justify tolling the applicable statutes of limitations. To the contrary, the Commonwealth has had unique access to facts regarding the exact sales and marketing practices forming the basis of the FAC for years prior to the filing of this action. Specifically, under the Consent Judgment, the Commonwealth had access to extensive information regarding Purdue's sales and marketing practices. To the extent it was concerned that Purdue was violating the Consent Judgment, it had the right to investigate. Ex. 16. The discovery rule cannot apply in such circumstances.[48] *See*

[48] Moreover, since at least 2008, the Commonwealth had access to extensive data regarding Purdue's prescription opioid marketing in Massachusetts, including the Commonwealth's data on opioid-related deaths from Massachusetts Department of Public Health and Massachusetts Prescription Management Program. In 2009, a Commonwealth OxyContin and Heroin Commission stated that the Commonwealth was suffering from a "serious and dangerous epidemic" relating to prescription drug use and opioid overdose deaths.[48] In addition, publicly available articles date back for at least a decade regarding Purdue's allegedly improper marketing practices. Many of these articles were quoted in the original Complaint. *See* (Compl. ¶¶162-170); *see also* (FAC ¶442). Additionally, many of the marketing materials cited in the FAC are publicly available.[48]

Stark v. Advanced Magnetics, Inc., 50 Mass. App. Ct. 226, 234 (2000) (in cases of actual fraud limitations period will not be tolled if plaintiff "had the means to acquire the facts on which his cause of action is based").

Moreover, the "discovery rule" invoked by the Commonwealth does not apply because the FAC fails to establish that any Individual Directors engaged in an affirmative act with intent to deceive, as required for the discovery rule to apply. Where, as here, the defendants owe no fiduciary duty to the plaintiff, the plaintiff must prove that the defendant concealed the existence of the plaintiff's cause of action through a separate "affirmative act done with the intent to deceive." *White v. Peabody Constr. Co.*, 386 Mass. 121, 132 (1982); *see also Abdallah v. Bain Capital LLC*, 880 F. Supp. 2d 190, 196 (D. Mass. 2012) (applying Massachusetts law). The FAC does not – and cannot, in light of the CIA – allege any affirmative act taken by any Individual Director to affirmative deceive the Commonwealth, pleading only that "[t]he individual defendants . . . concealed their participation in the deception and did not reveal to the Commonwealth the fact that they were directing and profiting from the deceptive scheme." (¶836). Because there are no alleged acts by any Individual Director, there can be no act with the intent to deceive. *See Burbridge v. Bd. of Assessors of Lexington*, 11 Mass. App. Ct. 546, 549 (1981) ("In the absence of a fiduciary relationship . . . mere silence is not a fraudulent concealment.").

Finally, lacking any allegations of concealment by any Individual Director, the FAC attempts to argue that tolling should apply based on Purdue's conduct, alleging that "defendants" generally (i) "conducted much of their deception through in-person sales visits," (ii) "concealed from the public and from the Commonwealth their internal documents," (iii) concealed "their findings that higher doses were a way to hook patients," and (iv) concealed "their knowledge of

inappropriate prescribing by high-prescribing doctors." (¶836). However, these allegations cannot establish that the limitations period as to any Individual Director should be tolled based on the conduct of Purdue, as these allegations relate to Purdue's alleged adoption of certain policies and to documents allegedly in Purdue's possession. The FAC fails to specify that any, let alone all, of the Individual Directors had a role in this alleged concealment, as required under Massachusetts law to toll the limitations period as to any Individual Director. *See Passatempo v. McMeimen*, 461 Mass. 279, 295 (2012) ("plaintiffs may not generally use the fraudulent concealment by one defendant as a means to toll the statute of limitations against other defendants.").

In sum, the Commonwealth has not and cannot salvage any of its Claims against the Individual Directors that are based on alleged conduct that occurred before June 12, 2014 for Chapter 93A and June 12, 2015 for public nuisance. As outlined above, the remaining allegations should be dismissed because they do not plead that any Individual Director participated in unlawful conduct.

CONCLUSION

For the reasons outlined above, the Commonwealth's claims against the Individual Directors should be dismissed with prejudice.

Respectfully submitted,

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